

AMENDED IN SENATE MAY 5, 2003

AMENDED IN SENATE APRIL 21, 2003

SENATE BILL

No. 265

Introduced by Senator Kuehl
(Principal coauthor: Senator Chesbro)
(Coauthors: Senators McClintock and Romero)
(Coauthors: Assembly Members Cohn and Pavley)

February 18, 2003

An act to amend Section 3044 of the Family Code, relating to child custody.

LEGISLATIVE COUNSEL'S DIGEST

SB 265, as amended, Kuehl. Child custody: domestic violence.

Existing law provides that it is the public policy of this state to ensure that children have frequent and continuing contact with both parents after the parents have separated or divorced, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing, except where the contact would not be in the best interest of the child. Existing law requires the court to consider specified factors in making a determination of the best interest of the child.

However, existing law provides that, upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence, there is a rebuttable presumption that an award of sole or joint custody of a child to that person is detrimental to the best interest of the child. The presumption may only be rebutted by a preponderance of the evidence. However, the presumption is not applicable in cases in which both parents are perpetrators of domestic violence. Existing law sets forth specified factors that the court is required to consider in

determining whether the presumption has been overcome. The court must consider, among other factors, whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of the child to the perpetrator is in the best interest of the child. In addition, if the perpetrator is on probation or parole, the court is required to consider whether the perpetrator is restrained by a protective order and whether he or she has complied with its terms or conditions.

This bill would revise those provisions to provide that, for purposes of determining the best interest of the child, the preference for frequent and continuing contact with both parents may not be used to rebut the presumption against the award of custody to a perpetrator of domestic violence. The bill would additionally require the court to consider, in determining whether the presumption has been overcome, whether the perpetrator is on probation or parole and whether he or she has complied with the terms and conditions of probation or parole. The bill would also require the court to consider whether the perpetrator is restrained by a protective order or restraining order, without regard to whether the perpetrator is on probation or parole, and whether the perpetrator has complied with the terms and conditions of the protective order or restraining order.

The bill would also make the presumption described above applicable in cases in which both parents have perpetrated domestic violence. The bill would require the court to determine who was the dominant aggressor, as described, for purposes of these provisions, upon making a finding that both parents have perpetrated domestic violence, as specified. In addition, the bill would explicitly expand the scope of these provisions to apply when there is evidence that a domestic violence restraining order has been issued against a party seeking custody, if that order is still in effect, or when there is evidence that a party has been convicted of any crime against the other party that comes within the definition of domestic violence, as specified. The bill would require the court to provide each of the parties with a written copy of these provisions and to inform them of these provisions in any custody or restraining order proceeding in which a party alleges that the other party has perpetrated domestic violence.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.



The people of the State of California do enact as follows:

SECTION 1. Section 3044 of the Family Code is amended to read:

3044. (a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.

(b) In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider all of the following factors:

(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.

(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

(5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.

(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(c) (1) Upon making a finding that both parents have perpetrated domestic violence, the court shall make a finding as to whether one parent was the dominant aggressor. If the court finds that one party was the dominant aggressor, the rebuttable presumption shall be applied only against the dominant aggressor. If the court finds that neither parent was the dominant aggressor, the presumption is not applicable against either parent.

(2) For purposes of this section, the term “dominant aggressor” has the meaning set forth in Section 13701 of the Penal Code.

(d) For purposes of this section, a person has “perpetrated domestic violence” when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child’s siblings.

(e) (1) For purposes of this section, ~~the requirement of a “finding by the court,” as used in subdivision (a) or (c), shall be satisfied by evidence that a domestic violence restraining order has been issued against the party seeking custody, after notice and an opportunity for a hearing, pursuant to Division 10 (commencing with Section 6200), if the restraining order is still in effect, and regardless of whether the court made explicit findings of fact on the record and regardless of whether the order was issued after a stipulation by the parties that did not include an acknowledgment by the party who is the subject of the restraining order that he or she had perpetrated domestic violence. Prior to issuing any restraining order upon a stipulation of the parties, the court shall inform the parties that issuance of the order will constitute a finding that invokes the presumption against awarding custody to the restrained party: a court may find, in its discretion, that evidence that a domestic violence restraining order has been issued against the party seeking custody, after notice and an opportunity for a hearing, pursuant to Division 10 (commencing with Section 6200), satisfies the requirement of a “finding” by the~~

1 *court, that a party seeking custody of a child has, or both parents*
2 *have, perpetrated domestic violence, for purposes of subdivision*
3 *(a) or (c).*

4 (2) The requirement of a finding by the court shall also be
5 satisfied by evidence that a party seeking custody has been
6 convicted within the previous five years, after a trial or a plea of
7 guilty or no contest, of any crime against the other party that comes
8 within the definition of domestic violence contained in Section
9 6211 and of abuse contained in Section 6203, including, but not
10 limited to, a crime described in subdivision (e) of Section 243 of,
11 or Section 261, 262, 273.5, 422, or 646.9 of the Penal Code.

12 (3) The requirement of a finding by the court shall also be
13 satisfied if another court has made a finding pursuant to
14 subdivision (a) based on conduct occurring within the previous
15 five years.

16 ~~(f) If no court has made a finding of domestic violence prior to~~
17 ~~a custody proceeding, and allegations of domestic violence are~~
18 ~~raised in the custody proceeding, the court shall make a finding as~~
19 ~~to whether the alleged perpetrator has committed domestic~~
20 ~~violence, or, pursuant to subdivision (c), whether one party was the~~
21 ~~dominant aggressor, as set forth in Section 13701 of the Penal~~
22 ~~Code. The~~

23 (f) *When a court makes a finding that a party has perpetrated*
24 *domestic violence, the court may not base its findings solely on*
25 *conclusions reached by a child custody evaluator or on the*
26 *recommendation of the Family Court Services staff, but shall*
27 *consider any relevant, admissible evidence submitted by the*
28 *parties.*

29 (g) In any custody or restraining order proceeding in which a
30 party has alleged that the other party has perpetrated domestic
31 violence in accordance with the terms of this section, the court
32 shall inform the parties of the existence of this section and shall
33 give them a copy of this section prior to any custody mediation in
34 the case.